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In the Supreme Court of the United States

WALTER S. STEVENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18pp

QUESTION PRESENTED

Whether the military judge properly suppressed blood evidence taken during a physical examination from a servicemember on the temporary disabled retired list.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-9a) is reported at 53 M.J. 257. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 10a-22a) is reported at 52 M.J. 504. The order of the military judge (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on August 2, 2000. A motion for reconsideration was denied on August 31, 2000 (Pet. App. 34a). The petition for a writ of certiorari was filed on November 29, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(2).

STATEMENT

Petitioner was charged with rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 (1994 & Supp V 1999). Before trial, the military judge granted a motion to suppress evidence. The United States Navy-Marine Corps Court of Criminal Appeals affirmed (Pet. App. 10a-22a). The United States Court of Appeals for the Armed Forces, however, reversed and remanded the case for an evidentiary hearing. *Id.* at 1a-9a.

As summarized in the findings of the military judge (Pet. App. 23a-26a), on November 23, 1992, the wife of a member of the United States Navy was allegedly raped at her on-base residence in Hawaii. During a subsequent medical examination of the victim, blood and semen samples were recovered from her body. In August 1993, the investigation of the rape was closed as unresolved by the Naval Criminal Investigative Service (NCIS).

At the time of the alleged rape, petitioner was serving in the United States Navy and stationed in Hawaii. On July 15, 1994, he was released from active duty and transferred to the Navy's Temporary Disability Retirement List (TDRL) because of a medical disability. Servicemembers are placed on the TDRL when their disability "may be of a permanent nature," but the circumstances do not permit a final determination that the condition is, in fact, "permanent . . . and stable." Pet. App. 4a (quoting 10 U.S.C. 1202). While on the TDRL, a servicemember receives retired pay. He is required to submit to periodic physical examinations, however, "to determine whether there has been a change in the disability for which he was temporarily retired." *Ibid.* (quoting 10 U.S.C. 1210(a)).

Failure of the servicemember to submit to such a periodic examination may lead to termination of retired pay. *Ibid.* When a physical examination leads to a determination that the member is "physically fit" to perform his or her duties, the military service can exercise a number of options, including returning the member to active duty with his consent. *Ibid.*

In November 1997, after reviewing police reports that implicated petitioner as a suspect in a "Peeping Tom" incident that occurred in the vicinity of the rape, NCIS reopened its investigation. Pet. App. 23a. Thereafter, the NCIS office in Hawaii asked NCIS Special Agent John McNutt, assigned to the NCIS office in Memphis, Tennessee, to interrogate petitioner, who was living in Memphis, and to ask him to provide NCIS with a sample of his blood. *Id.* at 24a.

After learning that petitioner was receiving medical treatment at the Veteran's Administration (VA) Hospital in Memphis, McNutt contacted the VA and was allowed to review petitioner's medical records. Pet. App. 24a. During that review, McNutt learned that petitioner was being treated for diabetes and a mental disorder. *Ibid.* Concerned for his safety and that of petitioner, McNutt decided that it was premature to contact petitioner about the investigation. *Ibid.* Instead, McNutt obtained petitioner's blood type from the VA and conveyed the information to NCIS headquarters. Comparison of petitioner's blood type to the information obtained from the blood and semen samples obtained during the victim's medical examination did not eliminate petitioner as a suspect in the rape. *Ibid.*

McNutt was asked to obtain a specimen of petitioner's blood. McNutt, who was aware that petitioner's treatment at the VA Hospital included drawing blood to monitor his diabetes, requested the assistance

of the Regional Counsel for the VA. Pet. App. 24a. McNutt informed him that petitioner was a suspect in a rape investigation and asked if NCIS could obtain a specimen of petitioner's blood whenever he might present himself at the VA Hospital in the normal course of his treatment. *Id.* at 25a. Regional counsel indicated that the VA could comply with NCIS's request and asked for a memorandum formalizing the request. *Ibid.* NCIS provided a memorandum asking that it be notified the next time that petitioner came to the VA hospital to have blood drawn. *Ibid.*

On June 3, 1998, petitioner appeared at the VA Hospital for a regularly scheduled medical visit and consented to having blood drawn for the purpose of medical treatment. Pet. App. 14a. A member of the medical staff inserted a vacuum needle into petitioner's arm, then affixed a tube to the needle and drew blood for medical purposes. The medical technician then removed the first tube and, within five or six seconds, affixed a second tube to the needle for the sole purpose of obtaining the blood specimen requested by NCIS. *Id.* at 25a. After the second specimen had been obtained, the technician removed the vacuum needle from petitioner's arm. *Ibid.* NCIS seized the second tube of blood and transmitted it to the United States Criminal Investigative Laboratory for deoxyribonucleic acid (DNA) comparison with forensic evidence obtained from the victim. *Id.* at 26a. On August 4, 1998, the laboratory reported that the DNA profiles developed from the November 1992 forensic evidence were attributable to the victim, petitioner, and one unknown individual. *Id.* at 14a n.4.

During a pretrial hearing, petitioner moved to suppress his blood and the DNA evidence obtained from him during the medical procedure. Pet. App. 23a. The

military judge granted the motion. *Id.* at 33a. In particular, he found that the blood and DNA evidence were the product of an unlawful seizure because they were not obtained under a search authorization or for a medical purpose, and because VA hospital staff obtained petitioner's consent to having his blood drawn by misrepresenting their purpose for obtaining the blood. *Id.* at 32a-33a. The military judge also rejected the government's contention that the blood evidence was the product of a lawful search authorized under Military Rule of Evidence 312(f). That rule provides that "[n]othing in th[e] rule [governing evidence obtained from body views and intrusions] shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember," and it exempts from exclusion during a court-martial, "[e]vidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose." Mil. R. Evid. 312(f). The military judge reasoned that the rule "is inapplicable to retired servicemembers on the TDR list, at least to the extent that the medical examination or intrusion was conducted for purposes other than ascertaining the status of a member's medical condition vis-à-vis return to an active duty status." Pet. App. 32a. Finally, the military judge held that the search effected by drawing the second tube of blood violated the defendant's due process rights as it was obtained without petitioner's informed consent and by misrepresentation as to the purpose for which the blood was to be used. *Id.* at 32a-33a.

The U.S. Navy-Marine Corps Court of Criminal Appeals affirmed. Pet. App. 10a. It held that, although the plain language of Mil. R. Evid. 312(f) "does not limit its applicability to active duty servicemembers," Pet.

App. 20a, there is no basis for applying the Rule "to members of the TDRL [as] a needed exception to the Fourth Amendment protections applicable to the general populace based upon military exigencies." *Id.* at 21a. The court explained that the armed forces do not rely on servicemembers on the TDRL to carry out military missions and therefore do not need to be able to take actions necessary to preserve their health as they would for active duty servicemembers. *Ibid.* "[I]n view of the inapplicability of Mil. R. Evid. 312(f)" to petitioner, the court found, "the search and seizure conducted in this case was unreasonable." *Ibid.*

After the Navy-Marine Corps Court of Criminal Appeals denied the government's motion for rehearing, the Judge Advocate General of the Navy (TJAG) certified to the Court of Appeals for the Armed Forces under Article 67(a)(2), UCMJ, 10 U.S.C. 867(a)(2),[1] the questions whether Mil. R. Evid. 312(f) applies to members of the TDRL and whether, if it does, petitioner's blood sample was admissible under that Rule. Pet. App. 2a. The court of appeals reversed, holding that Mil. R. Evid. 312(f) applies to all persons subject to court-martial proceedings regardless of the servicemember's status. Noting that the TDRL is a "'tempo-

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[1] Art. 67, UCMJ, 10 U.S.C. 867, provides in part:

> Review by the Court of Appeals for the Armed Forces
>
> (a) The Court of Appeals for the Armed Forces shall review the record in—
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> * * * * *
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review * * *.

rary' assignment, not a permanent separation from active duty" (Pet. App. 6a), it reasoned that "[t]he constitutional considerations that support the exercise of court-martial jurisdiction over a military member on the TDRL—the receipt of military pay and continuing military status—are no less significant when it comes to the use of evidence obtained during a valid medical procedure concerning the member's continued fitness for military duty." *Id.* at 7a. Accordingly, it concluded that "evidence obtained in compliance with Mil. R. Evid. 312(f) may be used in a court-martial of a person on the TDRL." *Id.* at 8a.

The court of appeals did not decide the question whether the blood sample taken for evidentiary purposes during petitioner's medical examination was admissible under Mil. R. Evid. 312(f). Instead, it remanded the question to the military judge for a determination whether prolonging the intrusion of the needle in petitioner's arm in order to draw the second tube of blood was a *de minimis* intrusion permissible under Mil. R. Evid. 312(f) and the Fourth Amendment. Pet. App. 8a-9a (citing *United States* v. *Fitten*, 42 M.J. 179 (C.M.A.) (upholding taking of second bottle of urine for investigation purposes when first bottle of urine and catheterization was for medical purpose), cert. denied, 516 U.S. 917 (1995)).

ARGUMENT

1. Petitioner does not dispute that bodily intrusions of active members of the armed forces, authorized by Mil. R. Evid. 312(f) "for valid medical purposes," are reasonable searches and seizures under the Fourth Amendment. Rather, petitioner contends (Pet. 7-15) that Mil. R. Evid. 312(f) does not, in view of his TDRL status, justify admitting the evidence obtained when

the military drew and analyzed his blood, and that the evidence was gathered in violation of the Fourth Amendment and should have been suppressed. As petitioner acknowledges, however, "the lower court chose not to analyze [his] case under a Fourth Amendment framework" (Pet. 8), but instead focused upon the narrower issue—unique to military jurisprudence—whether Mil. R. Evid. 312(f) applies to servicemembers on the TDRL. Because the lower court did not reach the Fourth Amendment question posed by petitioner, the Court should decline to review petitioner's claim. See, *e.g.*, *Brandon* v. *Holt*, 469 U.S. 464, 473 n. 25 (1985) (declining to review claim "[b]ecause the Court of Appeals did not address this argument").

2. Moreover, petitioner's Fourth Amendment claim is not ripe for review by this Court. The court below remanded this case to the military judge for a factual determination whether, during petitioner's physical examination, drawing the second tube of blood for law enforcement purposes constituted more than a *de minimis* intrusion. Pet. App. 8a-9a. If, following an evidentiary hearing, the military judge rules in petitioner's favor, the DNA evidence resulting from the blood drawing likely will be suppressed, thereby granting him precisely the relief he now seeks. If, on the other hand, the evidence is admitted, petitioner may still be acquitted on the merits, thereby mooting his claim. And, even if petitioner is convicted, and his conviction is affirmed on appeal, he may then be able to present his contention to this Court in a petition for a writ of certiorari seeking review of a final judgement against him.[2] Accordingly, review by this Court of the

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[2] We note, however, that, under Article 67a, UCMJ, 10 U.S.C. 867a, "[d]ecisions of the United States Court of Appeals for the

Court of Appeals for the Armed Forces' limited decision would be premature.

3. In any event, petitioner's claim that Rule 312(f) cannot constitutionally apply to him in view of his TDRL status is without merit. As petitioner concedes (Pet. 7), to the extent that the Fourth Amendment applies to the armed forces,[3] the courts are in agreement that its application must "take into account the exigencies of military necessity and unique conditions that may exist within the military society." *Murray* v.

Armed Forces are subject to review by the Supreme Court by writ of certiorari * * *. The Supreme Court may not review by writ of certiorari * * * any action by the Court of Appeals for the Armed Forces in refusing to grant a petition for review." Thus, if petitioner is ultimately convicted and his conviction is affirmed by the Navy-Marine Corps Court of Criminal Appeals, but the Court of Appeals for the Armed Forces denies a petition for review, petitioner will be unable to seek further review by this Court.

[3] While the Court has made clear that the Due Process Clause applies in courts-martial, see *Weiss* v. *United States*, 510 U.S. 163, 170 (1994), this Court has never otherwise expressly clarified the extent to which the Bill of Rights, including the Fourth Amendment, applies to the armed forces. See *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994) (noting that "[w]e have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military"). The President has decreed that evidence obtained from an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused at trials by court-martial, see Mil. R. Evid. 311(a), and the Court of Appeals for the Armed Forces has held that the Fourth Amendment right against unreasonable searches applies to the armed forces, see, *e.g.*, *Murray* v. *Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983) (quoting *United States* v. *Middleton*, 10 M.J. 123, 127 (C.M.A. 1981)). The parties do not contest the point, and it is unnecessary to resolve it now. See *Davis*, 512 U.S. at 457 n.*.

Haldeman, 16 M.J. 74, 81 (C.M.A. 1983) (compulsory drug urinalysis a reasonable seizure within the meaning of the Fourth Amendment); see also *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 671 (1989) (recognizing that members of the armed forces may reasonably "expect intrusive inquiries into their physical fitness"); *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975) (concluding that warrantless drug urinalysis inspections of armed forces personnel serving in Europe are reasonable and constitutional under the circumstances).

Petitioner does not assert that bodily intrusions authorized by Mil. R. Evid. 312(f) are unreasonable searches and seizures under the Fourth Amendment, or that evidence obtained in the course of such a procedure for an active duty servicemember should be suppressed. Indeed, in *Von Raab*, 489 U.S. at 672, the Court held that *civilian* employees of the federal government who are involved in law enforcement activities and are required to carry firearms in the line of duty have a "diminished expectation of privacy" in respect to bodily intrusions for the purpose of determining whether they are using illicit drugs that may adversely affect their "fitness and probity." See also *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 627-634 (1989) (holding that, because certain railway employees have diminished expectations of privacy by virtue of participation in an industry dependent on health and fitness of employees, involuntary drug and alcohol testing, following certain train accidents, are reasonable intrusions).

Instead, petitioner's principal argument (Pet. 10-13) is that such reasoning is inapplicable to servicemembers on the TDRL because they are not readily subject to active duty service and therefore their fit-

ness for duty has no bearing upon the military's mission.[4] In concluding that Mil. R. Evid. 312(f) applies to servicemembers on the TDRL, the court of appeals properly rejected this argument.

As the court explained (Pet. App. 6a-7a), Congress has expressly denominated status on the TDRL as involving "temporary disability." 10 U.S.C. 1210(a). Accordingly, Section 1210(a) requires servicemembers on the list to report for periodic physical examinations. The explicit purpose of such examinations is to determine whether the member is "physically fit to perform the duties of his office, grade or rank"—in which case, with his consent, he will be called to active duty as soon as possible (10 U.S.C. 1211(b))—or whether his physical disability is of such a nature that he should be removed and either retired or separated from the service for physical disability. See 10 U.S.C. 1210(c)-(e). Further, even if, following a physical evaluation, a member on the TDRL is determined to be unfit for duty and is retired for physical disability, the member retains military status and may be recalled to active duty under certain circumstances. See Pet. App. 7a (citing *Akol* v. *United States*, 167 Ct. Cl. 99 (1964)). The monitoring of the physical condition of a servicemember on the TDRL is, therefore, necessary for determining his fitness for possible recall in time of need.

For these reasons, it hardly can be said that a routine physical examination of a member on the TDRL to monitor a medical condition, such as diabetes, serves no plausible military health care objective, and that under

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[4] Petitioner incorrectly asserts that the ruling of the Court of Appeals for the Armed Forces affects the rights of all retired military personnel. The court made clear that the ruling applies only to individuals on the TDRL. See Pet. App. 6a.

this Court's precedents such examinations are "symbolic" measures rather than reasonable warrantless intrusions based upon particularized governmental needs. See Pet. 12-13 (quoting *Chandler* v. *Miller*, 520 U.S. 305, 322 (1997) (rejecting on Fourth Amendment grounds the requirement that candidates for public office submit to drug urinalysis)). Thus, as the court below properly concluded, the considerations that permit the armed forces to conduct medical evaluations of servicemembers and authorize the results of any incidental bodily intrusion to be used for evidentiary purposes under Mil. R. Evid. 312(f) apply as well to a servicemember on the TDRL.

4. Finally, petitioner maintains (Pet. 13-14) that, even if the military has a particularized need for conducting physical examinations of servicemembers on the TDRL, that interest does not justify the incremental invasion of his privacy occasioned by the DNA analysis upon a blood sample drawn during the course of his examination.[5] The court below, however, remanded the case for the military judge to determine whether the process of drawing the second tube of blood, subsequently used for DNA analysis, was itself an impermissible intrusion upon interests protected by the Fourth Amendment. The court of appeals, there-

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[5] Petitioner also suggests (Pet. 13) that, in releasing information concerning his DNA to law enforcement authorities for the purpose of prosecution without express judicial authorization, DOD personnel violated internal regulations. See Pet. 13 (citing DOD Directive 5154.24 (Dec. 28, 1996)). Such a violation would not be an independent basis for suppression of evidence. In *United States* v. *Caceres*, 440 U.S. 741, 755 (1979), this Court expressly "declin[ed] to adopt any rigid rule requiring federal courts to exclude any evidence obtained as a result of a violation of [internal agency] rules."

fore, did not address the question whether the ensuing analysis exceeded the scope of a lawful intrusion. Consequently, it would be premature for this Court to address the claim now. See, *e.g.*, *Brandon*, 469 U.S. at 473 n.25 (declining to review claim not addressed by court below).[6]

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[6] The petition in this case need not be held pending the decision in *Ferguson* v. *City of Charleston*, No. 99-936 (argued Oct. 4, 2000). In *Ferguson*, the issue is whether a program of testing the urine of pregnant women for cocaine, developed and implemented by hospital officials in collaboration with law enforcement officials, was justified under the "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment. While the analysis in *Ferguson* could conceivably be relevant to the question whether the taking of the blood sample and DNA analysis conducted for law enforcement in this case complied with the Fourth Amendment, the decision of the court of appeals did not conclusively resolve that issue, but instead remanded it for further evaluation. See Pet. App. 8a-9a. Although the court of appeals focused on "whether the prolonged intrusion of the needle in [petitioner's] arm while a second vial was placed on the vacuum needle, and then for some additional period while the blood was extracted into the vial, was a *de minimis* intrusion," *id.* at 8a, and not on whether the DNA testing was an additional intrusion, the analysis of that issue on remand can take account of any light that may be shed on the issue by *Ferguson*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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